UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WORLD COLOR (USA) CORP., a wholly owned subsidiary of QUAD/GRAPHICS, INC. Employer, and GRAPHIC COMMUNICATIONS CONFERENCE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 715-C Charging Party.	)	Case No.: 32-CA-062242

CHARGING PARTY'S RESPONSE TO ORDER TO SHOW CAUSE

The Charging Party, the Graphic Communications Conference of the International Brotherhood of Teamsters ("GCC" or "Union"), by and through its undersigned counsel, submits this response to the Order to Show Cause issued by the National Labor Relations Board ("NLRB" or "Board") on November 15, 2018 directing the parties to show cause as to why this case should not be remanded to the Administrative Law Judge ("ALJ") for further proceedings consistent with the Board's decision in *The Boeing Co.*, 365 NLRB No. 154 (2017). As explained below, the Union submits that *Boeing* does not require that this matter be remanded to the ALJ, and for the reasons set forth in the Union's statements of position and briefs already submitted in this matter, the Board should properly find that the respondent's rule prohibiting employees from wearing union insignia is a violation of Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "Act") on the fully developed record before the it.

BACKGROUND

The Respondent, Quad/Graphics, Inc. ("Employer," "Company" or "Quad"), operates a printing facility in Fernley, Nevada. Quad maintains a work rule at the Fernley plant prohibiting

employees from wearing hats at work, other than a few particular baseball caps bearing the Company's logo. There is no dispute that this policy prohibits employees from wearing any other kind of hat, including hats with union insignia. The Company's dress code also prohibits employees from wearing union t-shirts, sweatshirts, jackets, patches, buttons or pins.

On August 8, 2011, the Union filed an unfair labor practice charge against the Company alleging, *inter alia*, that its hat policy interferes with, restrains, and coerces employees in their exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act by preventing employees from wearing caps bearing union insignia. When read and applied in conjunction with Quad's uniform rules prohibiting union buttons, pins, or other apparel, the hat policy effectively prevents employees from wearing union insignia in any meaningful capacity at all.

On July 31, 2013, ALJ Cates found that Quad's hat policy unlawfully restricted employees from engaging in activity protected by the Act and directed the Employer to cease and desist from enforcing the rule. *See World Color (USA) Corp.*, No. 32-CA-062242, at *10, 11-12 (NLRB Div. of Judges, July 31, 2013). The NLRB affirmed the ALJ's decision on February 12, 2014, finding that the policy violated Section 8(a)(1) on its face in that it prohibits employees from engaging in the protected activity of wearing caps bearing union insignia. *World Color (USA) Corp.*, 360 NLRB 227, 227 n.3 (2013).

Thereafter, the Employer filed a petition for review with the U.S. Court of Appeals for the D.C. Circuit and the NLRB petitioned for enforcement of its order. Citing the standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Court noted that "[f]irst, the Board examines whether the rule explicitly restricts section 7 activity; if it does, the rule violates the Act. If the policy does not explicitly restrict protected activity, the Board considers whether (1) employees would reasonably construe the language to prohibit Section 7 activity; (2)

the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *World Color (USA) Corp. v. NLRB*, 776 F.3d 17, 20 (D.C. Cir. 2015) (internal quotations and citations omitted). The Court then took issue with the NLRB's conclusion that Quad's hat policy facially prohibited employees from displaying union insignia because, according to the Court, "[a]though the hat policy restricts the type of hat that may be worn, it does not say anything about whether union insignia may be attached to the hat." *World Color (USA) Corp. v. NLRB*, 776 F.3d 17, 20 (D.C. Cir. 2015). The Court therefore remanded the matter back to the NLRB for reconsideration of the second portion of the *Lutheran Heritage* analysis, whether the company's policy chilled employees' Section 7 rights or would be reasonably construed to restrict such rights. *Id.* at 21.

While the case was pending before the NLRB on remand, the Board issued its decision in *The Boeing Co.*, 365 NLRB No. 154 (2017), which overruled the "reasonably construe" standard set forth in second portion of the *Lutheran Heritage* analysis. Instead, it stated that "when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." 365 NLRB No. 154, slip op. at 4. To clarify this new test, the Board also described three "categories" of work rules to be evaluated under *Boeing*. So-called "category 1" rules are those which are lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. *Id.* Category 1 rules include benign policies that employees abide by a general code of civility in the workplace. *Id.* "Category 2" rules are those warranting individualized scrutiny in

each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications. *Id.* Lastly, "category 3" rules are those which are unlawful to maintain because they would prohibit or limit NLRA-protected activity, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule, such as a work rule prohibiting employees from discussing wages or benefits. *Id.*

In light of the *Boeing* decision overruling *Lutheran Heritage*, the NLRB issued a Notice to Show Cause on November 15, 2018 directing to parties to submit, in writing, why the case should not be remanded to the Division of Judges for further proceedings consistent with *Boeing*.

ARGUMENT

The Boeing Co., 365 NLRB No. 154 (2017) does not necessitate remanding this case to the NLRB division of Judges because, regardless of the issuance of the *Boeing* decision, and as argued in the Union's papers, the Employer cannot show that any special circumstances justify prohibiting the employees' from wearing union insignia at work. In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the Supreme Court confirmed that employees' right to wear union insignia is protected by Section 7 of the NLRA. *See Republic Aviation*, 324 U.S. 793, 803; *see also Fabri-Tek, Inc. v. NLRB*, 352 F.2d 577, 584 (8th Cir. 1965) ("It has been conclusively established that employees do have the right to wear union insignia during working time as a legitimate union activity and that interference with this right by the employer is generally unwarranted."). "An employer may prohibit the wearing of union insignia or insignia regarding working conditions by its employees if, and only if, the employer can demonstrate substantial evidence of special circumstances that would outweigh the employees' rights protected by Section 7 of the Act." *Goodyear Tire & Rubber Co.*, 357 NLRB 337, 341 (2011).

The "special circumstances" test applies to Quad's prohibition on union hats regardless of the new standards set forth in *Boeing*. *See, e.g.*, *Long Beach Mem'l Med. Ctr.*, 366 NLRB No. 66, slip op. at 2 (2018) (evaluating a work rule prohibiting employees from wearing badge reels branded with anything besides the employer's logo, including union insignia, under the special circumstances test after the issuance of *Boeing*); *see also Legacy Traditional School*, 28-CA-201248, at *21 (NLRB Div. of Judges, August 16, 2018) ("The Board has repeatedly held that employees have a right under the NLRA to wear clothing, buttons, and pins containing union or other protected concerted messages, and that a rule prohibiting them from doing so is unlawful unless the employer can show special circumstances justifying the restriction. There is no indication in *Boeing* or subsequent cases that the Board intended to overrule this precedent in that decision." (internal citations omitted)). Thus, *Boeing* does not change the Board's inquiry on whether Quad has shown special circumstances justifying its restriction on Section 7 conduct, and does not require further proceedings before the ALJ.[1]

Moreover, the rule set forth in *Boeing* is a purely legal test that does not require additional findings of fact before the ALJ. Accordingly, the Board has routinely refrained from remanding cases that were similarly decided under *Lutheran Heritage* for further proceedings consistent with *Boeing*, and instead simply addressed the merits under its new legal standards. *See, e.g.*, *Imagefirst Laundry & Distribution*, 366 NLRB No. 182, slip op. at 1, n.3 (2018); *see also Long Beach Mem'l Med. Ctr.*, 366 NLRB No. 66 (2018). This matter should not be handled any differently.

[1] For the reasons set out in the Union's prior briefs and position statements, Quad has failed to show such special circumstances. The Employer's supposition that the Quad hats are somehow safer than any other hat (including union hats) by virtue of bearing the Company's logo, or its vague and fantastical concerns of "gang activity" purportedly justifying the ban on union insignia fall woefully short of this standard.

The record in this case is already sufficiently developed and supports a finding that, even under *Boeing*, the Employer's prohibition on union insignia violates Section 8(a)(1) on its face. Further proceedings before the ALJ on that issue are not necessary. The record evidence in this case makes plain that Quad's ban on union hats should properly be categorized as a category 3 rule under *Boeing* and unlawful for the Employer to maintain. *See Universal Sec., Inc.*, 13-CA-178494 (NLRB, May 9, 2018) (adopting an ALJ's decision concluding that a rule requiring that employees use company-branded lanyards, and not lanyards branded with union insignia, "falls under Boeing category 3"). As shown in the Union's other papers, the rule effectively precludes employees from wearing union insignia in any meaningful capacity. The evidence already shows that this profoundly negative impact on employees' Section 7 rights is not outweighed by the Employer's stated business justifications for the rule which, if the Board does not find them to be entirely pretextual, fail to withstand even cursory scrutiny. Even treated as a *Boeing* category 2 rule, the Board should still find the hat policy unlawful on the record before it because, again, Quad cannot show substantial evidence of special circumstances justifying the restriction on employees' Section 7 rights. *See Long Beach Mem'l Med. Ctr.*, 366 NLRB No. 66, slip op. at 2 (2018).

To clarify, while the *Boeing* decision does not present cause to remand this case, the Union maintains that if the Board cannot conclude that Quad's hat policy violates Section 8(a)(1) on the current record, the Board should still remand the matter to the Division of Judges for additional findings of fact on how its safety and uniform policies are applied as to union insignia generally. *See Dayton Power & Light*, 267 NLRB No. 41 (1983); NLRB Rules and Regulations, Section 102.154. Indeed, the Employer has posited that employees might still be able to don union insignia, notwithstanding the Company's strict dress codes and work rules, if they wore GCC-branded socks or a hair tie with "Teamsters" written on it in tiny lettering. The GCC submits that

these paltry allowances are plainly insufficient to serve as the full extent of Section 7 conduct permitted by the Employer and do not merit serious consideration. *NLRB v. Autodie Int'l, Inc.,* 169 F.3d 378, 383 (6th Cir. 1999) ("Wearing union insignia furthers the right of employees to communicate ***effectively*** with one another regarding self organization at the jobsite." (emphasis supplied)). Even still, the Union acknowledges that the record lacks evidence on what extent, if any, the Employer permits employees to wear union insignia in other, more creative forms. Thus, if the Board determines that it cannot conclude that Quad's hat policy is an unfair labor practice on the current evidence (even though the record is sufficiently developed to support such a finding), the Board should remand the case back to the Division of Judges for that limited purpose—not for any reason related to the Board's decision in *Boeing*.

CONCLUSION

For the reasons stated above, the Board need not, and should not remand this matter to the Division of Judges for further proceedings consistent with the NLRB's decision in *Boeing*. However, as argued in the Union's briefs previously submitted in this matter, if the Board cannot find that Quad's policies are unlawful under Section 8(a)(1) on the record before it, the Board should remand the matter back to the Division of Judges for further findings of fact.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29th day of November, 2018, the foregoing Response of the Charging Party Graphic Communications Conference of the International Brotherhood of Teamsters to the Order to Show Cause was filed electronically with the National Labor Relations Board and served upon the following individuals via email:

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